UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR-03-80-B-W
	)	
GERARDO MARINARO	)	

SENTENCING ORDER

Gerardo Marinaro, an Italian citizen, is a genuinely likeable, hard working family man, who has an unfortunate knack for occasionally making notably bad decisions. Having pleaded guilty to illegal re-entry into the United States after deportation for an aggravated felony, a violation of 8 U.S.C. § 1326(a), Mr. Marinaro asks this Court to depart downward under the Sentencing Guidelines, because his criminal history category significantly over-represents the seriousness of his criminal history and the likelihood he will commit future crimes, U.S.S.G. § 4A1.3, because of his family ties and responsibilities, U.S.S.G. § 5H1.6, and because of multiple circumstances, including his over-represented criminal history category, his family ties, the dire impact of a prolonged sentence on his family business, his impulsive and aberrant criminal conduct, and the enhanced effect a sentence will have upon him and his family as a foreign national, U.S.S.G. § 5K2.0(c). Failing a downward departure under the Guidelines, Mr. Marinaro asks this Court, consistent with its authority under *United States v. Booker*, ___U.S. ___, 125 S. Ct. 738 (2005), to impose a lower statutory sentence in accordance with the factors set forth in 18 U.S.C. § 3553(a)(1), (2).

I. FACTS AND PROCEDURAL HISTORY

All was well with Mr. Marinaro, as a twenty-two-year-old living in Arlington, Massachusetts, until his employer died. Mr. Marinaro suddenly found himself out of work and,

despite his efforts, unable to obtain employment. He began hanging with the wrong crowd and became enamored with an older woman whose lifestyle was exciting and edgy. His life soon became a "living nightmare." He began "drinking and drugging" and slipped into the world of drug dealing. In 1988, he was arrested and, in 1989, convicted in the Commonwealth of Massachusetts of trafficking 200 grams or more of cocaine and of conspiring to violate the state Controlled Substance Act. He was sentenced to ten years and one day of incarceration. After release in March 1993, Mr. Marinaro was deported to Italy. Mr. Marinaro paid his own ticket back and made the firm decision to change.

He returned to his native town in southern Italy and completed a culinary arts program as a gourmet chef. Through the intervention of his parish priest, Mr. Marinaro was introduced to Giuseppina Mellilo. They fell in love, married, and moved to Germany to start a business, landing in the small southern German town of Wurmlingen. With the help of Giuseppina, they opened an Italian restaurant in Wurmlingen. The restaurant was successful, and over time, the Marinaros expanded, opening a small hotel and a place for wedding receptions. Although highly leveraged and now with two children, the Marinaros worked extraordinarily long hours. Their prospects were bright, and would have remained so, had he stayed home.

Here, the story takes a twist. Mr. Marinaro enjoys hunting, and while surfing the internet, he came upon hunting land for sale in New Brunswick, Canada. He was intrigued and ended up sending €28,000.00 to New Brunswick to buy the land sight unseen. The deed was to arrive in Germany on August 21, 2003. It did not. He waited for nearly a month and still no deed came. Finally, in mid-September 2003, fearing an internet scam, he contacted the seller. He was informed there was a problem with the title and they would send the money back to him. He immediately resolved instead to fly to Canada and retrieve his money. Mr. Marinaro arrived in

Fredericton, New Brunswick on September 22, 2003 and proceeded directly to the seller. His worst fears were unfounded, and the seller returned the €28,000.00. Mr. Marinaro had time and money on his hands. His flight home did not leave until September 28, 2003; he quickly got bored and made a bad decision: he placed a phone call to his old girlfriend, Gianina Coppola, who was still living in Boston. Ms. Coppola hopped on the next plane and headed for Fredericton. She arrived on September 23, 2003, and Mr. Marinaro drove her in his rental car to Miramichi, New Brunswick. They spent a few days there and traveled together to St. John, New Brunswick. Mr. Marinaro testified he was surprised to learn Ms. Coppola was interested in reinitiating a romantic relationship. He said he only wanted friendship for a couple of days, but she had been in love with him fifteen years before and still was. She wanted more from him than he was willing to give, and on September 26, 2003, they decided it would be better if she returned to Boston. He agreed to drive her from St. John to Fredericton so she could catch a return flight to Boston.

Heading to the airport, Mr. Marinaro made a series of bad choices. He testified he missed an exit and found himself in St. Stephen, New Brunswick, across the river from Calais, Maine. On the spur of the moment, for reasons he could not really explain, he decided to cross the international bridge and enter the United States. Approached by United States Customs, Mr. Marinaro proceeded to lie. He told the Agent he had never previously been in the United States, and he completed the visa form denying he had ever been convicted of a violation related to a controlled substance or been a controlled substance trafficker. He also denied he had ever been deported or removed from the United States. Mr. Marinaro was arrested and placed in custody, where he has remained since September 26, 2003. On November 13, 2003, he was indicted and

on January 7, 2004, he pleaded guilty to re-entry into the United States after deportation for an aggravated felony.

The Presentence Investigation Report was revised on April 14, 2004 and contained some sobering news. The 2002 version of the Guidelines[1] results in the following calculations: the base offense level for unlawful reentry is 8;[2] the severity of Mr. Marinaro's previous conviction increases his base offense level by 16, U.S.S.G. § 2L1.2(b)(1)(A)(i); and after adjustments for acceptance of responsibility, Mr. Marinaro's total offense level is 21. Mr. Marinaro's criminal history places him in Category II, and the applicable guideline range of imprisonment for a total offense level of 21 and Criminal History Category II is 41-51 months.

II. DISCUSSION

A. Departure from Advisory Guideline Range

[1] The Presentence Investigation Report applied the 2003 version of the Guidelines and Mr. Marinaro initially briefed the downward departure issues on the assumption the 2003 version of the Guidelines applied to the case. This Court was unclear whether the 2002 or 2003 version applied and ordered the parties to brief the issue. On November 2, 2004, this Court issued an order that concluded the 2002 version of the Guidelines applied, because it was more favorable to Mr. Marinaro than the 2003 version. Order on Defendant's Motion for Downward Departure (Docket # 47). One impact of the order was that Mr. Marinaro's fast track issue became unavailable, because the 2002 version of the Guidelines did not include the fast track program under U.S.S.G. § 5K3.1. Mr. Marinaro still wished to preserve the fast track argument, and therefore this Court informed him if he elected to proceed under the 2003 Guidelines, this Court would allow him to do so, but he could not proceed under both the 2003 and 2002 versions, selecting those provisions of each version more favorable to him. Mr. Marinaro then made the eminently practical, but legally suspect argument that this Court should proceed forward, make decisions under both versions of the Guidelines and he would then select which version he wanted to be applied. This Court rejected this novel "sneak peek" approach to sentencing and, when pressed at the evidentiary hearing, Mr. Marinaro reluctantly selected application of the 2002 version of the Guidelines, preserving his objection to being required to do so.

[2] U.S.S.G. § 2L1.2 reads, in part:

> (a) Base Offense Level: 8
> (b) Specific Offense Characteristic
> (1) Apply the Greatest:
> If the defendant previously was deported, or unlawfully remained in the United States, after--
> (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by **16** levels . . . .

1. Criminal History Category: U.S.S.G. § 4A1.3

Mr. Marinaro asks this Court to depart under § 4A1.3 and assess his Criminal History Category as Category I instead of Category II because his criminal history category over-represents the likelihood he will commit other crimes.[3] Mr. Marinaro does not gain much by such a reduction: under Category I, Mr. Marinaro still faces an imprisonment range of 37-46 months, shaving only 4 months from the low end and 5 months from the high end.[4] Under § 4A1.3, a downward departure may be warranted "where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes."

Mr. Marinaro wisely does not contend Category II over-represents the seriousness of his criminal history. It does not. Mr. Marinaro's 1989 convictions were for extremely serious violations of the drug laws of the Commonwealth of Massachusetts, and he acknowledges he "abused the hospitality of the United States" and "deserved his conviction, his punishment, and his deportation." Def.'s Am. Mot. for Downward Departure and Sentencing Mem. (Docket # 39) at 1. Further, § 4A1.1(a) instructs: "Add **3** points for each prior sentence of imprisonment exceeding one year and one month." Mr. Marinaro easily met the § 4A1.1(a) threshold: he received a ten-year sentence in 1989. In fact, with three criminal history points, Mr. Marinaro is at the higher end of Category II. A horizontal departure would require this Court to treat Mr. Marinaro as though he had just one criminal history point, or had been sentenced to an imprisonment term of less than thirteen months. Mr. Marinaro has neither claimed nor established that a departure under this provision is justified.

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[3] Mr. Marinaro urges this Court to consider the relative lack of sophistication in his commission of this crime. However, whether he committed this offense with sophistication is neither established nor relevant to a § 4A1.3 analysis.

[4] Section 4A1.3 prohibits a departure below the lower limit of the applicable guideline range under Category I; here, 37 months.

Instead, Mr. Marinaro pins his hope on the second phrase in § 4A1.3, "the likelihood that the defendant will commit other crimes." Here, he succeeds. In § 4A1.3, the Sentencing Commission recognizes the limitations of a numerical criminal history scoring system and allows departures where "reliable information indicates that the criminal history category does not adequately reflect . . . the likelihood that the defendant will commit other crimes." *See United States v. Woodley*, 344 F. Supp. 2d 274, 276-77 (D. Mass. 2004). Section 4A1.3 departures are "encouraged departures" under *Koon v. United States*, 518 U.S. 81 (1996). *United States v. Wilkerson*, 183 F. Supp. 2d 373, 380 (D. Mass. 2002).

A criminal history departure under § 4A1.3 is distinct from a departure under § 5K2.0, which requires the existence of "an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." *Woodley*, 344 F. Supp. 2d at 277 n.4; *Wilkerson*, 183 F. Supp. 2d at 380. The statutory authority for a § 4A1.3 departure lies in the provision of the Sentencing Reform Act that gives the court the authority "to take into account, where relevant, the defendant's criminal background." *United States v. Shoupe*, 988 F.2d 440, 446 (3d Cir. 1993). Thus, the court does not have to find there is "something atypical or unusual about the defendant's record." *Woodley*, 344 F. Supp. 2d at 277.

Judge Gertner recently pointed out that greater flexibility does not mean a judge should make a departure determination based on criminal record "out of thin air." *Id.* at 277. The sentencing court should consider "the purpose of the criminal history scoring, its structure and its limitations, and then determine where this defendant's record fits within it." *Id.* The purpose of the criminal history provisions is "'to provide harsher sentences for those with a prior record of misconduct, general deterrence of crime, and protection of the public from criminal recidivists.'"

Id. (quoting *United States v. Hammond,* 240 F. Supp. 2d 872, 877 (E.D. Wis. 2003)); *see also* U.S.S.G. Ch. 4, Part A, Introductory Commentary.

"The appropriate starting point for the [§ 4A.1.3 analysis] consists of those offenses which resulted in convictions." *United States v. Footman*, 66 F. Supp. 2d 83, 99 (D. Mass. 1999), *aff'd*, 215 F.3d 145 (1st Cir. 2000). Here, as already noted, Mr. Marinaro's prior conviction generated a score of three, placing him on the higher end of Category II because of the seriousness of the 1989 convictions. Other considerations include whether there were prior sentences not counted in computing the criminal history and whether the prior sentences were for substantially more than one year and derived from independent crimes on different occasions. *Id.* For Mr. Marinaro, these considerations are mixed, but generally favorable. Mr. Marinaro has one uncounted offense—a disturbing the peace conviction when he was twenty-two years old for which he was fined $140.00. His sentence for the drug offense was for substantially over one year and is the only countable crime.

There is authority that a § 4A1.3 departure based on a single conviction would be appropriate only in "exceptional circumstances." *United States v. Carrasco,* 313 F.3d 750, 758 (2d Cir. 2002). *Carrasco* notes that a § 4A1.3 departure is appropriate with single convictions only if the facts of the prior offense reveal the conduct underlying the conviction was relatively minor, despite the imposition of a sentence that required extra criminal history points. *Id.* at 757-58. *Carrasco* emphasized that if a sentencing court departs under § 4A1.3 for a defendant with only one prior conviction, "detailed findings would have to be made to demonstrate entitlement to such a departure." *Id.* at 758.

The Eighth Circuit case of *United States v. Dyck,* 334 F.3d 736 (8th Cir. 2003), also addressing a conviction under 8 U.S.C. § 1326, bears comment. In *Dyck*, the sentencing court

departed downward under § 4A1.3 from a Category III to Category II on ground that his prior federal drug trafficking conviction for attempting to smuggle 84.4 pounds of marijuana into the United States overrepresented the seriousness of his criminal history. *Id.* at 738. The Eighth Circuit reversed. Contrasting the example in § 4A1.3, it noted that Mr. Dyck's illegal reentry occurred only six months after his deportation and that his earlier conviction was not a misdemeanor. *Id*. at 740. The instant case falls in between. Mr. Marinaro's earlier convictions were certainly not misdemeanors, but they did occur in 1989, fourteen years before his illegal reentry.[5] Although helpful, *Dyck* is not dispositive.

Criminal history departures permit the court "to put the defendant's record in the context of his life and background." *Wilkerson*, 183 F. Supp. 2d at 380. Other courts have considered such issues as the age of the defendant at the time of the various offenses, *id*., the relationship between the offenses and drug use, *United States v. Hammond*, 37 F. Supp. 2d 204, 205 (E.D.N.Y. 1999), whether the crimes were violent or non-violent, *Woodley*, 344 F. Supp. 2d at 278, and how close in time were the prior offenses—whether they were "part of a single crime spree during a finite period of distress, rather than reflecting a life of crime," *id*.

This Court makes the following findings. Mr. Marinaro was twenty-five years old on January 15, 1988, when he was arrested for the Massachusetts drug offenses. He was convicted on June 27, 1989 and sentenced to ten years and one day. There is no indication in this record that Mr. Marinaro committed any acts of violence in carrying out his drug offenses. He was deported on March 7, 1993, and upon his return to Italy, he entered culinary arts school and completed that program as a gourmet chef. He married Giuseppina Melillo and moved to southern Germany. The Marinaros have two children, ages five and ten. Mr. Marinaro has led

[5] The fourteen year gap alone could probably not be used to justify a downward departure under a Guideline section other than § 4A1.3. *See United States v. Stultz*, 356 F.3d 261, 268-69 (2d Cir. 2004).

an exemplary life since his 1989 convictions. He has started and developed a successful restaurant, inn, and catering service. He has worked hard, and, as evidenced by numerous supportive letters, he has attained the respect and admiration of his German neighbors. There is no sign Mr. Marinaro has been involved in any criminal activity, including use of or dealing in illegal drugs, in the fifteen year period between his arrest in Massachusetts and his arrest in Maine. There is nothing about Mr. Marinaro's commission of this crime that hints of violent behavior. Mr. Marinaro is now forty-three years old and has a wife and family to support. Although this Court has qualms about the accuracy of some of his testimony, it is his earnest desire to return to Germany, to revive his businesses, and to re-emerge as a good father and husband. This Court concludes in the unusual circumstances of this case, Mr. Marinaro's 1989 convictions over-represent the likelihood he will recidivate, and therefore, this Court GRANTS his motion for downward departure under § 4A1.3. Mr. Marinaro's criminal history category will be considered Category I for purposes of sentencing.

2. Family Ties and Responsibilities: U.S.S.G. § 5H1.6

Sentencing Guideline § 5H1.6 provides: "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine." This factor is "discouraged," and "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." *Koon*, 518 U.S. at 95 (citation and internal punctuation omitted); *United States v. Mejia*, 309 F.3d 67, 70 (1st Cir. 2002)(citation and internal punctuation omitted). The court should depart on such basis "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*,

518 U.S. at 96; *see also United States v. Rushby*, 936 F.2d 41, 42-43 (1st Cir. 1991)(stating no basis existed to justify downward departure for family ties and responsibilities when defendant's "strong family ties" consisted of ten years of marriage, having two sons, acting as main breadwinner for family, functioning as caretaker when his wife worked, and doing chores such as grocery shopping and snow shoveling for his wife's grandmother).

Section 5H1.6 motions, often involving some combination of a defendant's financial and non-financial obligations, including caretaking responsibilities and family members' medical needs, require courts to engage in fact-specific inquiries. *Compare United States v. Haversat*, 22 F.3d 790, 797 (8th Cir. 1994), *cert. denied*, 516 U.S. 1027 (1995)(defendant's wife's potentially life-threatening psychiatric condition justified departure); *United States v. Gaskill*, 991 F.2d 82, 86 (3d Cir. 1993)(defendant's responsibility for mentally ill wife might justify departure); *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992)(sole responsibility for raising four children justified departure); *United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991)(twelve-year marriage, two children, living with disabled, dependent father and grandmother justified departure); *United States v. Pena*, 930 F.2d 1486, 1494-95 (10th Cir. 1991)(single parent of infant and sole supporter of sixteen-year-old daughter and daughter's infant justified departure); *United States v. Big Crow*, 898 F.2d 1326, 1332 (8th Cir. 1990)(solid family and community ties and "consistent efforts to lead a decent life in [the] difficult environment" of an Indian reservation justified departure), *with Carrasco*, 313 F.3d at 756-57 (defendant's separation from wife, being father of three children, and the illness of his father not exceptional circumstances); *United States v. Gagliardi*, 116 F.3d 464 (1st Cir. 1997)(defendant's sister's attention deficit disorder and mother's breast cancer insufficient for departure); *United States v. Chestna*, 962 F.2d 103, 107 (1st Cir. 1992), *cert. denied*, 506 U.S.

920 (1992)(no departure justification for a defendant who was single mother of four children); *United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir. 1992), *cert. denied*, 506 U.S. 857 (1992)(no departure justification for a defendant who supported two minor children and live-in mother); *United States v. Cacho*, 951 F.2d 308, 310-11 (11th Cir. 1992)(no departure justification for a defendant who had four small children); *United States v. Carr*, 932 F.2d 67, 72 (1st Cir. 1991), *cert. denied*, 502 U.S. 834 (1991)(no departure justification for codefendants who were parents of young child); *United States v. Shoupe*, 929 F.2d 116, 121 (3d Cir. 1991), *cert. denied*, 502 U.S. 943 (1991)(father who regularly made child support payments and frequently spoke with young son living with ex-wife insufficient to support departure); *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990), *cert. denied*, 498 U.S. 1014 (1990)(no departure justification for a defendant who was sole custodial parent of two children); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir. 1990)(no departure justification for a defendant who had stable family life); *United States v. Pozzy*, 902 F.2d 133, 139 (1st Cir. 1990), *cert. denied*, 498 U.S. 943 (1990)(no departure justification for a defendant who was pregnant and whose husband was imprisoned).

"Disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." *Johnson*, 964 F.2d at 128. Disintegration of family life in most cases is not enough to warrant departures. *Gaskill*, 991 F.2d at 85. The Guidelines state that personal financial difficulties and economic pressure upon a trade or business do not warrant a decrease in sentence. U.S.S.G. § 5K2.12; *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993); *see also United States v. Sharapan*, 13 F.3d 781, 785 (3d Cir. 1994)(seeing "nothing extraordinary" in fact that defendant's incarceration may cause harm to business and employees because "same is presumably true in a great many cases in

which the principal of a small business is jailed"); *United States v. Reilly*, 33 F.3d 1396, 1424 (3d Cir. 1994)(potentially harmful consequences of defendant's incarceration on family and family businesses were not sufficient basis for departure); *United States v. Ellis*, No. CRIM. A. 95-435-4, 1997 WL 297080, at *5 (E.D. Pa. May 22, 1997)(defendant's son's unemployment, resulting from defendant's incarceration and loss of defendant's business, was not consequence out of ordinary to warrant departure).

Mr. Marinaro seeks a departure under § 5H1.6 because he claims his family will lose "the fruits of 10 years of labor, both [his] and his wife's. The loss will cost Mr. Marinaro's family essential financial support to a degree not suffered by an offender who simply loses his job, let alone an offender who makes his living by illegal means." Def.'s Am. Mot. for Downward Departure and Sentencing Mem. at 5. Mr. Marinaro posits his family will lose the income he provides and all their financial assets and his employees will suffer harm from the business loss. However, Mr. Marinaro concedes it is "difficult to present evidence showing definitively that the sentencing departure [he] seeks will prevent this loss of financial assets." *Id*. The Government argues Mr. Marinaro's case is less compelling than those in which the First Circuit has denied downward departures and, further, Mr. Marinaro has not demonstrated that his putative financial loss satisfies the standards of § 5H1.6.

At the hearing on the motion, there was evidence Mr. Marinaro's business is nearing the breaking point. However, by his own admission, his wife contributes to the success of the business and she has worked to sustain the business while he has been incarcerated and will continue to do so. Even assuming Mr. Marinaro's business, family, and employees will suffer the adverse consequences he claims, the losses are the sort commonly flowing from incarceration and are insufficient to remove his case from the heartland. *See Sharapan*, 13 F.3d

at 785; *Reilly*, 33 F.3d at 1424; *Ellis*, 1997 WL 297080, at *5. The difficulties and diminution in financial support to his family caused by his absence are those inherent in incarceration and not dissimilar to numerous other cases. *See Gaskill*, 991 F.2d at 85; *Johnson*, 964 F.2d at 128. This Court denies Mr. Marinaro's motion for downward departure for family ties and responsibilities under § 5H1.6.

3. Absence of Fast Track Program: U.S.S.G. § 5K3.1[6]

This Court has already addressed and rejected Mr. Marinaro's argument that differences in sentencing resulting from prosecutorial procedures and practices justify a downward departure. *See* Order on Def.'s Mot. for Downward Departure (Docket # 47) at 6-7. Mr. Marinaro has now chosen to proceed under the 2002 version of the Guidelines. The 2002 version of the Guidelines did not include the fast track program under § 5K3.1, which became effective on October 27, 2003, as part of the PROTECT Act. Under the applicable Guidelines, Mr. Marinaro would have no right to the fast track program, regardless of where his case was adjudicated. Therefore, this Court need not address Mr. Marinaro's contention that he may be adversely affected by an asserted disparity in a sentencing scheme that does not apply to him.

4. *Blakely* and *Shepard*

Relying on *Blakely v. Washington*, 124 S. Ct. 2531 (2004), Mr. Marinaro argues that his 1989 convictions should not be double counted. Mr. Marinaro points out that the 1989 convictions are counted both for criminal history purposes under § 4A1.1 and for enhancement purposes under § 2L1.2(b)(1)A). Mr. Marinaro's double counting point has been considered and firmly rejected by the First Circuit. *United States v. Zapata*, 1 F.3d 46, 47 (1st Cir. 1993)("In

[6] U.S.S.G. § 5K3.1, titled "Early Disposition Programs (Policy Statement)," provides:

> Upon motion of the Government, the Court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

the sentencing context, double counting is a phenomenon that is less sinister than the name implies."). Undeterred, Mr. Marinaro presses forward. He takes heart from *Blakely,* asserting this Court cannot consider the facts underlying the convictions: "The lack of specificity in Mr. Marinaro's plea agreement . . . puts the undisputed facts underlying his conviction off limits for sentencing purposes." Def.'s Further Supplemental Sentencing Mem. (Docket # 62) at 8.

On March 7, 2005, Mr. Marinaro's argument seemed to gain force from the United States Supreme Court in *Shepard v. United States*, ___ U.S. ___, 125 S. Ct. 1254 (2005). In *Shepard,* the Supreme Court held that "an enquiry under the [Armed Career Criminal Act] to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 1263.

However, even under *Shepard,* Mr. Marinaro's convictions were not under nongeneric statutes and they do not present a *Shepard* issue. *See* Government's Ex. 1. Further, he waived any *Shepard* argument. At his sentencing hearing, Mr. Marinaro testified at length about the facts underlying his 1989 convictions presumably to convince this Court to impose a lower sentence. He cannot present evidence to this Court and then restrict its use. Finally, Mr. Marinaro has convinced this Court to depart downward to a Category I, which obviates any double counting.

5. Multiple Circumstances: U.S.S.G. § 5K2.0(c)

Mr. Marinaro argues he is entitled to a downward departure under § 5K2.0(c) based on a combination of the following circumstances: (1) his criminal history overstates the likelihood he

will reoffend; (2) his conduct was aberrant; (3) his family will suffer dire collateral consequences; (4) he committed the offense in a way that demonstrated it was an act of impulse rather than of planning; and, (5) as a foreign national, any prison sentence imposed on him and on his family will be unusually severe. The 2002 version of the Guidelines did not include § 5K2.0(c); however the 2002 version of § 5K2.0 similarly contemplates a downward departure based on a combination of circumstances:

> [A]n offender characteristic or other circumstance that is . . . "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

The Commentary to § 5K2.0 further explains:

> The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances [that separately would not warrant departure], differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

A combination of factors, which individually may not rise to the level to allow a departure, can, when viewed together, provide a basis for departure under § 5K2.0. *See, e.g.*, *United States v. Lombard*, 72 F.3d 170, 184 (1st Cir. 1995), *cert. denied*, 520 U.S. 1266 (1997)(remand for resentencing was required, since district court failed to recognize possibility of downward departure for combination of factors not adequately taken into consideration by Sentencing Commission where guidelines would have imposed life imprisonment on substantive firearms offenses, in light of uncharged relevant conduct of murder for which defendant was acquitted in state court); *Mena v. United States*, No. 04 Civ. 6523(AKH), 2004 WL 2734454, at

*1 (S.D.N.Y. Nov. 30, 2004)(finding a departure was available under § 5K2.0 where the combination of circumstances showed defendant to be "a hard-working, honest, law-abiding person," who succumbed to the temptation of a drug deal by "the loss of his job, the inability to provide for his family, his condition of severe depression that caused him to lose the balance of his judgment and to do something that he had never done before in his life, that is, engage in criminal conduct"); *United States v. Hancock*, 95 F. Supp. 2d 280, 288 (E.D. Pa. 2000)(the atypical nature of the offense conduct, the aberrational nature of the defendant's actions, his employment, and his remorse and desire to atone for his conduct warrant a departure when considered as a whole, even if they do not do so individually).

Here, this Court has already granted a downward departure under § 4A1.3[7] and has denied a downward departure under § 5H1.6. It is questionable whether the allegedly aberrational and impulsive nature of Mr. Marinaro's conduct or his status as a foreign national should grant him a lesser sentence under the Guidelines. Violations of 8 U.S.C. § 1326 do not require specific intent. *United States v. Cabral*, 252 F.3d 520, 524 (1st Cir. 2001); *United States v. Soto*, 106 F.3d 1040, 1041 (1st Cir. 1997), *cert. denied*, 522 U.S. 829 (1997). A person convicted of violating § 1326 is therefore not eligible for a lesser harm departure under U.S.S.G. § 5K2.11, because the statute "reflects the past misconduct of the illegally reentering alien, and . . . is not concerned with the alien's purpose in re-entering." *Carrasco*, 313 F.3d at 755; *see also United States v. Leiva-Deras*, 359 F.3d 183, 191 (2d Cir. 2004)(departure for personal safety may not be permissible for violation of § 1326); *United States v. Saucedo-Patino*, 358 F.3d 790, 795 (11th Cir. 2004)("[H]is motive for reentry should not factor into the decision whether to depart downward."). *Carrasco* states that § 1326 was "designed to deter deported aliens from

[7] Mr. Marinaro contends this Court cannot double count the prior convictions to enhance his sentence, but has no compunctions arguing it should be double counted to reduce his sentence.

illegally reentering for any reason." *Carrasco*, 313 F.3d at 755 This Court cannot go behind Mr. Marinaro's conviction, assess the degree of propriety or calculation in his reentry, and depart downward if it concludes he reentered the United States with all good intentions.

This Court is unimpressed with the argument that, because he is a foreign national, the sentence will have an unduly harsh impact. Incarceration is inevitably a harsh punishment, whether the defendant is an Italian citizen from Germany or a United States citizen from Maine. This Court rejects the notion it should impose a more lenient sentence on a foreign national and obversely a harsher sentence on citizen of the United States because of his place of origin or residence.

B. Sentencing Factors: 18 U.S.C. § 3553

18 U.S.C. § 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Section 3553(a)(2) states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) instructs sentencing courts to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed based on the purposes described above; (3) the kinds of sentences available; (4) the sentencing range established by the guidelines; (5) any pertinent policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and, (7) the need

to provide restitution to any victims of the offense. Judge Adelman grouped these factors into three categories: the nature of the offense, the history and character of the defendant, and the needs of the public and any victims of the crime. *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 960 (E.D. Wis. 2005).

1. Nature of the Offense

Mr. Marinaro's crime is a most serious one. Convicted of drug trafficking and conspiracy, sentenced to ten years in state prison, and deported, it should have been plain to Mr. Marinaro that he was not welcome back in the United States. The structure of § 1326 is indicative of the congressional intent to impose significantly enhanced penalties for illegal re-entry depending upon the reason for deportation. *See United States v. Campbell,* 967 F. 2d 20, 24 (2d Cir. 1992)("[T]he flouting of American immigration laws is a far graver matter where the defendant's prior deportation was for committing a serious crime . . . ."). An illegal re-entry without a serious prior crime subjects the defendant only to a maximum of two years incarceration. § 1326(a). However, if the re-entrant, like Mr. Marinaro, has been removed subsequent to a conviction for commission of an aggravated felony, the maximum period of incarceration escalates to twenty years. § 1326(b)(2).

There is a wealth of authority that a violation of § 1326 is a crime without a *mens rea* requirement; therefore, why Mr. Marinaro decided to violate this country's immigration laws is beside the point. *But see Galvez-Barrios,* 355 F. Supp. 2d at 964 (honorable motive for reentry considered in downward departure). Simply being "found in" the United States is an independent basis for prosecution. § 1326; *Carrasco,* 313 F.3d at 755; *United States v. Acevedo,* 229 F.3d 350, 355 (2d Cir. 2000), *cert. denied*, 531 U.S. 1027 (2000); *United States v. Rodriguez,* 26 F.3d 4, 8 (1st Cir. 1994). The case law is replete with examples of individuals

who violated § 1326 for what to them and to others might be good and sufficient reasons. *United States v. Hernandez-Baide,* 392 F.3d 1153, 1156 (10th Cir. 2004)(prevent termination of her parental rights and adoption of her daughter), *petition for cert. filed* (U.S. Mar 18, 2005)(No. 04-9385); *Leiva-Deras,* 359 F.3d at 187 (fear for life in El Salvador); *United States v. Dyer,* 325 F.3d 464, 470-71 (3d Cir. 2003), *cert. denied*, 540 U.S. 977 (2003)(obtain legal employment); *Saucedo-Patino,* 358 F.3d at 794-95 (supporting his family); *United States v. Gonzalez-Chavez,* 122 F.3d 15, 16-17 (8th Cir. 1997)(good faith belief in right to reenter). In *Zapata,* the First Circuit stated:

> [A]n alien who, having been deported following a conviction for an aggravated felony, and having exhibited a willingness to flout our laws again by reentering the country without permission, may be more likely to commit serious crimes than an alien who unlawfully reenters this country with no criminal record or with a less sullied record, and, thus, deserves a sentence possessing greater deterrent impact.

Zapata, 1 F.3d at 49. In Judge Posner's words, "an alien who has been deported reenters this country at his peril." *United States v. Anton,* 683 F.2d 1011, 1019 (7th Cir. 1982)(Posner, J., dissenting), *overruled by United States v. Carlos-Colmenares*, 253 F.3d 276 (7th Cir. 2001).

2. History and Character of Defendant

Except for his 1989 convictions and his illegal re-entry, Mr. Marinaro's history and character are largely positive. This Court has set forth in detail Mr. Marinaro's story. It suffices to say that, since his 1989 convictions, Mr. Marinaro has become a productive member of society. Many people in Germany have submitted letters attesting to his good character and value to the community. Mr. Marinaro has accepted responsibility for his crime and appears both genuinely remorseful and cognizant of the effects of his actions. In sum, the record

contains much salutary evidence about Mr. Marinaro's character and confirms he has renounced his criminal past.

The counterpoint is Mr. Marinaro's own testimony before this Court. Mr. Marinaro's testimony was entirely credible up to his call to Ms. Coppola. From then on, it was largely incredible. This Court views with utmost skepticism Mr. Marinaro's protestations that he was seeking only a platonic relationship from his old girlfriend. Further, if one intends to travel from St. John to Fredericton, New Brunswick, it takes more than one wrong turn to end up in St. Stephen on the Canadian end of the international bridge. Mr. Marinaro must have taken a series of conscious and purposeful actions to arrive where he did. Further, when confronted by Immigration, he lied repeatedly.

Mr. Marinaro was at a loss to explain why he decided to re-enter the United States. One of his supporters wrote that he intended to seek out his estranged eighteen-year-old daughter from his first marriage.[8] Mr. Marinaro denied this, although he expressed paternal affection for her. Mr. Marinaro himself postulated that, once across the border, perhaps he and Ms. Coppola might have spent the night in Bangor; that perhaps he entered to deny his past; and finally, he testified that he was not sure why he wanted to reenter. None of this makes a whit of sense. This Court cannot conclude, based on its observations of Mr. Marinaro and his level of accomplishment, that he is a witless man and therefore must conclude his re-entry was deliberate and purposeful. This Court could engage in useless speculation about Mr. Marinaro's real

[8] Bob Mowdy, one supporter, wrote: "What possible reason could he have for such a silly attempt to break the law? May I suggest that the feelings of a parent, especially an estranged parent become a law of their own. They cause us mere men to do crazy things to protect our loved ones, and in this case just a chance to see his daughter became a law that overrode his reason."

reasons for re-entry, but his performance on the stand leads to the inescapable conclusion he was not telling the whole truth to this Court.[9]

3. Needs of the Public

This Court also considers the needs of the public, including the need to promote respect for immigration law and to deter removed felons from re-entering. This factor supports a substantial prison sentence. One public need is to avoid sentencing disparity. The Sentencing Act provides, as *Booker* noted, that the sentencing court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *Booker*, 125 S. Ct. at 767. Under the Guidelines, defendants across this country convicted of Mr. Marinaro's crime with his prior convictions face a similar Guideline sentence. Congress has also, however, expressed a desire to allow the courts "flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B); *Booker*, 125 S. Ct. at 767. Mr. Marinaro himself is not dangerous, and a lengthy incarceration is not necessary to protect the public. Finally, there are no victims of this crime. *See* 18 U.S.C. § 3663A(a)(2)("'[V]ictim' means a person directly and proximately harmed as a result of the commission of an offense . . . .").

C. Determination of Sentence and Use of Guidelines

The statutory factors under § 3553 do not justify a sentence that varies with the advisory sentencing range set forth in the Guidelines.[10]

[9] Mr. Marinaro's motivations for re-entry have nothing to do with the commission of the crime. But, if a defendant is to take the stand seeking a lighter sentence, the least this Court must demand is the whole truth.

[10] This is true regardless of this Court's view of the weight to give the advisory sentencing range when considering the statutory factors. *Compare United States v. Jaber*, No. CRIM.02-10201-NG, 2005 WL 605787 (D. Mass. Mar. 16, 2005), *and United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005), *with United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

III. CONCLUSION

This Court GRANTS the Defendant's Motion for Downward Departure under U.S.S.G. § 4A1.3 and recharacterizes the Defendant's criminal history category from Category II to Category I. It otherwise DENIES the Defendant's Motion for Downward Departure under the Guidelines and declines to impose a statutory sentence outside the guideline range.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 13th day of April, 2005

Defendant

GERARDO MARINARO (1) represented by **BRUCE C. MALLONEE**
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401
(207) 947-4501
Email: bmallonee@rudman-winchell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

C. LEIGH MCCARTHY
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401
(207) 947-4501
Email: lmccarthy@rudman-winchell.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

ANTHONY D. PELLEGRINI
RUDMAN & WINCHELL
84 HARLOW STREET

P.O. BOX 1401
BANGOR, ME 04401
(207) 947-4501
Email: apellegrini@rudman-winchell.com
ATTORNEY TO BE NOTICED

Plaintiff

USA represented by **F. TODD LOWELL**
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
P.O. BOX 2460
BANGOR, ME 04402-2460
207-945-0373
Email: todd.lowell@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED